

U.S. Department of Labor

**Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002**

**(202) 565-5330
(202) 565-5325 (FAX)**



**'Notice: This is an electronic bench opinion which has not been
verified as official'**

Date: 08/23/99

Case No.: **1999 INA 160**

In the Matter of:

VILLA BERULIA, Employer,

on behalf of

CARLOS GERMAN DUMANCELA, Alien.

Certifying Officer: Hon. John Castellani, Region II

Appearance: Rev. Robert Vitaglione, of Brooklyn, New York, Agent for Employer and Alien.

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from the labor certification application that VILLA BERULIA ("Employer") filed on behalf of CARLOS GERMAN DUMANCELA ("Alien"), under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor at New York, New York, denied the application, and the Employer requested review pursuant to 20 CFR § 656.26.¹

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible for labor certification unless the

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work that (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.²

STATEMENT OF THE CASE

STATEMENT OF THE CASE

On January 22, 1996, the Employer applied for alien employment certification on behalf of the Alien to fill the position of "Cook" in its Restaurant. Employer's application described the Job Duties as follows:

COOK, prepares, seasons, cooks and garnishes all kinds of meals, including meats, poultries, pastas, vegetables according to Italian cuisine requirements, and cakes. Bakes, roasts and fries all foodstuffs. Spaghettini Maria, Lasagna, Tortellini, Salmon con Fughetti, Scallops, Chicken Scorpouelo, Chicken Brusilia, Veal Faillaud, Sliced Steak, Prime Sirloin Steak, Cheese cake, Italian Pastry, etc, etc.

AF 21, box 13. Based on Employer's description of the duties of the Job to be Performed, the position was classified as a Cook, Specialty, Italian Food, under DOT Occupational Code No. 313.361-030.³ The educational requirement was six years of grade school, and the work experience requirement was two years in the Job Offered. *Id.*, box 14. This was a forty hour a week job from 12:00 PM to 8:00 PM, with no provision for overtime at an hourly rate of \$17.43. *Id.*, boxes 10 -12.⁴

²Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Naturalization Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

³313.361-030 **COOK, SPECIALTY, FOREIGN FOOD (hotel & rest.)** Plans menus and cooks foreign-style dishes, dinners, desserts, and other foods, according to recipes: Prepares meats, soups, sauces, vegetables, and other foods prior to cooking. Seasons and cooks food according to prescribed method. Portions and garnishes food. Serves food to waiters on order. Estimates food consumption and requisitions or purchases supplies. Usually employed in restaurant specializing in foreign cuisine, such as French, Scandinavian, German, Swiss, Italian, Spanish, Hungarian, and Cantonese. May be designated according to type of food specialty prepared as Cook, Chinese-Style Food (hotel & rest.); Cook, Italian-Style Food (hotel & rest.); Cook, Kosher-Style Food (hotel & rest.); Cook, Spanish-Style Food (hotel & rest.). *GOE: 05.10.08 STRENGTH: M GED: R3 M3 L2 SVP: 7 DLU: 77*

⁴ A national of Ecuador, the Alien was born 1965. He attended primary school from March 1971 to December 1977. He was living and working in the United States on the date of application. His visa status was given as EWI. The Alien worked as a cook in Ecuador from 1983 to 1986. From September 1987 to the date of application he worked for the Employer in the Job Offered. The description of his Ecuadorean job included all of the basic dishes listed in AF 21 at box 13, but none of the Italian dishes. The Alien's work in the Job Offered included all of the Italian style dishes, however. AF 18, box 15, compare a and b.

Notice of Findings. On May 26, 1998, the Certifying Officer ("CO") issued a Notice of Findings ("NOF") proposing to deny certification. AF 39-40. The CO explained that the Alien had no Italian cooking experience before his employment with Employer. The CO found that the Employer appeared to have trained the alien for this position. By way of rebuttal the Employer was directed to document the reasons, if any, that it is not feasible to train an equally qualified U. S. worker in the same manner. In the alternative, the Employer was directed to submit evidence showing that at the time Employer hired him, the Alien had the qualifications Employer is now requires, or to reduce the hiring requirements to the level of the Alien's skills at the time he was hired. The CO further stated that the alien's letter of prior experience established experience in the cuisine he learned prior to his employment by the Employer, which was not Italian. Employer was directed to take the following corrective actions to rebut this finding: (1) documenting why it is not now feasible to train a U.S. worker in its Italian specialty cooking; or (2) amending the requirements and document willingness to re-advertise. AF 39.⁵

Rebuttal. Employer submitted a rebuttal on June 21, 1998 stating that its job description never required Italian cooking but just general cooking. AF 43. Employer further stated that the alien "started to work as a fully experienced cook in international and continental, as well as Italian dishes." The Employer said the Alien was never trained by its establishment. AF 42.

Final Determination. The CO's Final Determination was issued July 21, 1998. Finding that Employer's statement that the alien had the experience at the time of hiring was not supported by the Alien's letter of prior experience, which indicated he had experience in his native cuisine, the CO said Employer had failed to prove that the Alien had two years' experience in Italian cooking at the time it hired him. The CO also concluded that Employer had failed to show why a U. S. worker with the Alien's qualifications at the time Employer hired him for the position could not be trained for the job. In the alternative the Employer failed to amend its job requirements to the level at which the Alien was qualified at the time it hired him. Consequently, the CO denied certification.

Appeal. On August 24, 1998, the Employer requested administrative/judicial review of the denial by the Board of Alien Labor Certification Appeals ("Board"). AF 53-54. Employer attached several pages of new evidence to its appeal. AF 41-52. The translated statement by the manager of the Plaza Hotel, where he worked from March 1983 to March 1986 did not contradict the CO's finding as to the Alien's qualifications at the time the Employer hired him. AF 48.

DISCUSSION

New evidence. Before discussing the issue referred in this appeal, the Panel notes first that Employer submitted new evidence with its appeal. It is well established that evidence first submitted with the request for review will not be considered by BALCA. **Capriccio's Restaurant**, 90 INA 480 (Jan 7, 1992). The reason is that the newly proffered evidence was not

⁵The bare assertion that it is not feasible to train is insufficient to establish that an employer cannot now hire a worker with less experience and provide training. **MMMATS, Inc.**, 87-INA-540(Nov. 24, 1987)(*en banc*)

considered by the CO, and the new documents attached to the appeal were not part of the record upon which CO denied certification. 20 CFR §§ 656.26(b)(4) and 656.27(c). For this reason the Employer's "new evidence" will not be considered in the Panel's review of the CO's denial of certification. **O'Malley Glass & Millwork Co.**, 88 INA 049 (Mar. 13, 1989); **Universal Energy Systems, Inc.**, 88 INA 005 (Jan. 4, 1989).⁶

Job requirements. Although the Employer argued that it seeks to employ a Cook with general experience, and not with specialized experience in cooking Italian style food, its Application contradicted this contention and it is not persuasive. AF 43.⁷ The Employer's Application described the position as a "Cook who prepares, seasons, cooks and garnishes all kinds of meals, including meats, poultries, pastas, and vegetables according to Italian tastes," and then it listed examples of specific Italian dishes served in the restaurant. AF 06. The job description in the Application clearly did not support Employer's claim that it intended to hire a Cook with experience in general cooking, since the DOT occupation description of a Cook (hotel & rest.) does not include comparable illustrations of foreign specialty foods. The Employer may not require qualifications that are any more strict than the list of skills in the DOT occupation description. **Artcraft Blazers**, 94 INA 269 (Jul. 26, 1995); **Approach, Inc.**, 90 INA 293 (Oct. 30, 1991). Although the Employer's job description matched the DOT

⁶See also **Capriccio's Restaurant**, *supra*; **Kelper International Corp.**, 90 INA 191 (May 20, 1991); **Kogan & Moore Architects, Inc.**, 90 INA 466 (May 10, 1991). For more recent cases see **Sidhu Assoc., Inc.**, 95 INA 182 (Jan. 2, 1997); **Roy Lipman Org., Inc.**, 95 INA 071 (Jul. 26, 1996); **Schroeder Brothers Co.**, 91 INA 324 (Aug. 26, 1992). For general discussion see **Construction and Investment Corp.**, 8 INA 055 (Apr. 24, 1989) (*en banc*).

⁷313.361-014 **COOK** (hotel & rest.) alternate titles: cook, restaurant prepares, seasons, and cooks soups, meats, vegetables, desserts, and other foodstuffs for consumption in eating establishments: Reads menu to estimate food requirements and orders food from supplier or procures food from storage. Adjusts thermostat controls to regulate temperature of ovens, broilers, grills, roasters, and steam kettles. Measures and mixes ingredients according to recipe, using variety of kitchen utensils and equipment, such as blenders, mixers, grinders, slicers, and tenderizers, to prepare soups, salads, gravies, desserts, sauces, and casseroles. Bakes, roasts, broils, and steams meats, fish, vegetables, and other foods. Adds seasoning to foods during mixing or cooking, according to personal judgment and experience. Observes and tests foods being cooked by tasting, smelling, and piercing with fork to determine that it is cooked. Carves meats, portions food on serving plates, adds gravies and sauces, and garnishes servings to fill orders. May supervise other cooks and kitchen employees. May wash, peel, cut, and shred vegetables and fruits to prepare them for use. May butcher chickens, fish, and shellfish. May cut, trim, and bone meat prior to cooking. May bake bread, rolls, cakes, and pastry [BAKER (hotel & rest.) 313.381-010]. May price items on menu. May be designated according to meal cooked or shift worked as Cook, Dinner (hotel & rest.); Cook, Morning (hotel & rest.); or according to food item prepared as Cook, Roast (hotel & rest.); or according to method of cooking as Cook, Broiler (hotel & rest.). May substitute for and relieve or assist other cooks during emergencies or rush periods and be designated Cook, Relief (hotel & rest.). May prepare and cook meals for institutionalized patients requiring special diets and be designated Food-Service Worker (hotel & rest.). May be designated: Cook, Dessert (hotel & rest.); Cook, Fry (hotel & rest.); Cook, Night (hotel & rest.); Cook, Sauce (hotel & rest.); Cook, Soup (hotel & rest.); Cook, Special Diet (hotel & rest.); Cook, Vegetable (hotel & rest.). May oversee work of patients assigned to kitchen for work therapy purposes when working in psychiatric hospital. GOE: 05.05.17 STRENGTH: M GED: R3 M3 L3 SVP: 7 DLU: 81 Prepares food and serves restaurant patrons at counters or tables: Takes order from customer and cooks foods requiring short preparation time, according to customer requirements. Completes order from steamtable and serves customer at table or counter. Accepts payment and makes change, or writes charge slip. Carves meats, makes sandwiches, and brews coffee. May clean food preparation equipment and work area. May clean counter or tables. GOE: 05.05.17 STRENGTH: M GED: R3 M3 L3 SVP: 7 DLU: 81

occupation description of a Cook, Specialist, Foreign Food (hotel & rest.), Employer's rebuttal nevertheless argued that it is not seeking a Cook with specialized experience, but wants to hire a Cook with general experience, as described in the DOT at No 313.361-014 COOK (hotel & rest.). AF 43.

The Panel concludes that the NOF provided adequate notice of the reasons for the denial of certification, that the Employer was told how to cure the defects found in the application, and that its rebuttal failed to sustain the burden of proof. As the greater weight of the credible evidence supported the CO's denial of alien labor certification, the following order will enter.

ORDER

The denial of alien labor certification by Certifying Officer is hereby affirmed.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

